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# Supreme Court of the United States.

OCTOBER TERM, 1968.

No. ~~1504 MISC.~~ No. 926

ARTHUR F. BURHOE, *Petitioner,*

*v.*

HON. ANTHONY JULIAN, as he is Judge of the United States District Court for the District of Massachusetts, and GARRETT BYRNE, as he is District Attorney for the Suffolk District, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 1504 MISC.

ARTHUR F. BURHOE, *Petitioner,*

*v.*

HON. ANTHONY JULIAN, as he is Judge of the United States District Court for the District of Massachusetts, *Respondent.*

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

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# Supreme Court of the United States.

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OCTOBER TERM, 1968.

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No.

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---

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

---

Arthur F. Burhoe prays that a writ of certiorari issue to review the judgment of the United States Court of Ap-

peals for the First Circuit dismissing a petition for writ of mandamus under 28 U.S.C. § 1651, entered in the above-entitled case *sub nom. In re Arthur F. Burhoe*,[1] on November 4, 1968.

Petitioner also moves the Court for leave to file the petition for a writ of mandamus, and further moves that an order and rule be entered and issued directing the Honorable Anthony Julian, Judge of the United States District Court for the District of Massachusetts, to show cause why a writ of mandamus should not be issued against him.

The petitions are presented in a consolidated pleading because they arise out of the same basic case. See petition in *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713.

## Citations to Opinions Below.

The opinion of the respondent Judge Julian of the District Court for the District of Massachusetts, which embodies the order that led petitioner to file his petition for writ of mandamus in the Court of Appeals, is reported at 289 F. Supp. 408, and is printed in Appendix A, *infra*. The Court of Appeals did not file an opinion, but merely a one-sentence order (unreported) denying the petition "for want of jurisdiction." This order is printed in Appendix B, *infra*.

## Jurisdiction.

The jurisdiction of this Court to issue a petition for writ of certiorari is invoked under 28 U.S.C. § 1254 (1), to review a judgment of the Court of Appeals entered on No-

[1] See Rule 7 of the Rules of the United States Court of Appeals for the First Circuit, effective July 1, 1968.

vember 4, 1968. See *Delaware, Lackawanna & Western Railroad Co.* v. *Rellstab*, 276 U.S. 1.

The jurisdiction of this Court in the petition for writ of mandamus is invoked pursuant to the provisions of 28 U.S.C. § 1651. The judgment of the District Court giving rise to this petition for writ of mandamus was rendered on September 6, 1968.

**Questions Presented.**

1. Does a United States Court of Appeals have jurisdiction of a petition for writ of mandamus under 28 U.S.C. § 1651, to compel a judge of a District Court within its circuit to refer to a three-judge panel a complaint seeking to enjoin enforcement of a state statute?

2. Should a complaint in a District Court seeking to enjoin the enforcement of a state statute by a state officer on grounds that, as interpreted by its highest court, the statute conflicts with the Double Jeopardy Clause of the Fifth Amendment as applied to the states by the Fourteenth Amendment have been heard by a three-judge panel prior to dismissal?

3. When a state statute authorizes a state judge either to hear testimony in a criminal case in which he has jurisdiction to render a verdict and impose sentence or, after hearing it, in his discretion, to decline jurisdiction and bind the defendant to a grand jury for indictment on the same charge, does a complaint challenging the constitutionality of that statute present a substantial federal question?

4. Can a District Court issue an injunction to enjoin the prosecution of an indictment against a defendant in a state court when said indictment has been obtained pursuant to a statute that places the defendant in double jeopardy?

## Statutes Involved.

The Fifth and Fourteenth Amendments of the Constitution of the United States; 28 U.S.C. §§ 1331, 1651, 2281 and 2284; Massachusetts General Laws, c. 218, §§ 1, 26 and 30, c. 266, § 60, and Rule 21 of the Federal Rules of Appellate Procedure are printed in Appendix C hereto.

## Statement.

On June 25, 1968, petitioner, a resident of Boston, filed in the United States District Court for the District of Massachusetts a complaint under 28 U.S.C. §§ 1331, 2281 and 2284, in which he sought to enjoin the enforcement of a statute of the Commonwealth of Massachusetts. In general, the factual allegations of the complaint are summarized in the respondent's opinion, printed in Appendix A.

Briefly stated, the complaint alleges that the petitioner was put to trial in the Municipal Court for the Charlestown District, a court of the Commonwealth of Massachusetts, on charges of receiving stolen goods (p. 2); that this court had jurisdiction to try the petitioner on these charges (p. 2); that during the trial the Charlestown court, acting pursuant to a state statute, declined to hear further evidence, but, over objection, bound petitioner over to the Superior Court of the Commonwealth for indictment on the same charges (p. 2); that the defendant to the complaint, an officer of the Commonwealth (p. 3), acting pursuant to the same state statute, caused the petitioner to be indicted on the same charges (p. 3); that these indictments are now pending (p. 3); and that, if the petitioner is tried on these indictments, he can receive a maximum

sentence of five years rather than the maximum two-and-one-half-year sentence that the Charlestown court could have imposed (p. 3). The complaint further avers that the statute, Mass. Gen. Laws, c. 218, § 30, which purports to authorize the Charlestown court to decline to hear further evidence after trial has commenced and to authorize the defendant Byrne to indict and prosecute the petitioner thereafter, is unconstitutional under the Fifth and Fourteenth Amendments to the Constitution of the United States.

To enjoin the defendant from enforcing section 30 of chapter 218 by proceeding with the indictment against him, the complaint sought preliminary and permanent injunctions by a three-judge panel, 28 U.S.C. §§ 2281 and 2284. The complaint alleges damages in excess of ten thousand dollars and invokes the original jurisdiction of the United States District Courts in cases founded upon a federal question, 28 U.S.C. § 1331.

On September 6, 1968, the District Court, acting through a single judge, dismissed the complaint, 289 F. Supp. 408, 411. Petitioner then on October 24, 1968, petitioned the Court of Appeals for a writ of mandamus under 28 U.S.C. § 1651, to compel the judge of the District Court to refer his complaint to a three-judge panel. On November 4, 1968, this petition was dismissed solely on jurisdictional grounds, without opportunity for argument or hearing. The present petition for writ of certiorari seeks to review the judgment of the Court of Appeals denying jurisdiction, and the present petition for writ of mandamus seeks the relief that the Court of Appeals denied.

## Reasons for Granting the Writs.

### I. The Court of Appeals Erred in Holding that it Lacked Jurisdiction over the Petition.

The decision of the Court of Appeals is directly in conflict with two decisions of the Court of Appeals for the District of Columbia Circuit. In *Svejovsky* v. *Tamm,* 326 F. 2d 657, 658, and *Reed Enterprises* v. *Corcoran,* 354 F. 2d 519, 523-524, the District of Columbia court upheld the use of mandamus under the All Writs Statute, 28 U.S.C. § 1651, to obtain guidance on the appointment of a three-judge panel in a District Court. If the Court of Appeals for the First Circuit in the instant case meant to hold no more than that, where guidance is sought by a party who has been refused a three-judge panel (see *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 716), such guidance cannot be invoked on a petition for writ of mandamus; there is a palpable and definite conflict between two circuits.[2]

If, on the other hand, the Court of Appeals in its cryptic, one-sentence judgment meant to say that it is without jurisdiction over the subject matter of the petition which it denied, its decision is in conflict with the decision of this Court in *Idlewild Bon Voyage Liquor Corp.* v. *Epstein, supra,* which holds that a Court of Appeals is empowered to give "guidance when a single judge has erroneously invaded the province of a three-judge court."

Since the decision of this Court in the *Idlewild* case, *supra,* it is to be hoped and expected that plaintiffs who have been denied three-judge panels in the District Courts

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[2] Both the *Svejovsky* and the *Reed Enterprises* cases were specifically called to the First Circuit's attention in the petition for writ of mandamus, under part I, Reasons for Granting the Writ, p. 4.

will seek the guidance of the Courts of Appeals rather than coming to this Court directly. *Cf. Stratton* v. *Saint Louis Southwestern R.R. Co.*, 282 U.S. 10. It is hardly necessary to recite the circumstance that cases calling for three-judge courts frequently involve sensitive and immediate problems. Petitioner submits that it is essential to the efficient administration of justice that lawyers know by what procedure they may invoke the guidance which *Idlewild* says the Courts of Appeals are empowered to give.

When a District Court judge refuses to refer a complaint to a three-judge court, and a plaintiff seeks the guidance of a Court of Appeals, little of substance turns on whether that guidance comes on a petition for writ of mandamus (as it did in the *Svejovsky* and the *Reed Enterprises* cases, *supra*) or on direct appeal (as it did in *Idlewild*). Nevertheless, both historical and practical considerations militate in favor of allowing parties to invoke that guidance by mandamus.

The historical reason is that mandamus has been the traditional remedy in this Court to compel submission of an appropriate complaint to a three-judge panel. *Ex parte Bransford*, 310 U.S. 354, 355. Since it has become clear that Courts of Appeals have jurisdiction to give guidance when a three-judge panel is refused, a writ of mandamus issued to compel, or to state an opinion on,[3] such submission is "appropriate in aid" of the court's jurisdiction.

The practical considerations are more cogent. A party whose case is required to be heard by three judges, particularly a party like the present petitioner, who seeks and needs a preliminary injunction, is stymied at the outset when the appointment of a three-judge court is refused. He has no means of circumventing the District Court's

[3] See Relief Sought, p. 4 of the Petition for Writ of Mandamus in the Court of Appeals.

jurisdiction. If the District Court judge erred in refusing to refer the case, the plaintiff's sole recourse is to correct that error in this Court or in a Court of Appeals. After that he must commence all over on the case-in-chief to show why a preliminary injunction should issue. Such an injunction can, of course, be appealed directly to this Court. Thereafter the case must be heard in the District Court on the permanent injunction, and again there is a right of appeal. In view of the length of the journey that plaintiffs proceeding under 28 U.S.C. §§ 2281 and 2284, must travel as well as the need for swiftness at the outset, justice and expedience dictate that their preliminary detours be kept as short and inexpensive as possible. On these criteria, mandamus is entirely preferable to appeal.

Under Rule 21 (d) of the Federal Rules of Appellate Procedure the petition may be typewritten (*cf.* Rules 30 and 32 of the Federal Rules of Appellate Procedure, requiring printing of the brief and appendix on appeal), under Rule 21 (b) a quick answer to the petition may be obtained and briefs may not even be required, and under the same rule the proceeding is "given preference over ordinary civil cases."

No inconvenience to the courts or the parties is wrought by following the mandamus route. When a District Court judge refuses to refer a complaint to *a three-judge* panel, his action, as in the present case, is usually taken on the face of the complaint. Thus the only papers in the District Court are the complaint and the dismissal. These would doubtless be part of the record appendix on an appeal; in a petition for writ of mandamus they would be attached to the petition under Rule 21 (a) of the Federal Rules of Appellate Procedure. In any event, the record before the Court of Appeals is the same whether mandamus or appeal is employed.

## II. The Complaint Meets All Formal Requirements for Hearing by a Three-Judge Court under 28 U.S.C. §§ 2281 and 2284.

Judge Julian's memorandum and order does not controvert that the statute here in question, Mass. Gen. Laws, c. 218, § 30, is one of state-wide application. See Mass. Gen. Laws, c. 218, § 1, dividing the entire Commonwealth of Massachusetts into judicial districts for purposes of Municipal and District Court jurisdiction. Section 30 of Mass. Gen. Laws, c. 218, is applicable to a criminal proceeding in any of these courts. Nor can there be any doubt that the defendant to the complaint, Garrett Byrne, is a state officer under Massachusetts law. *Attorney General* v. *Pelletier*, 240 Mass. 264, 294. No question is raised in the memorandum of the so-called "abstention" doctrine (see *Railroad Commissioner of Texas* v. *Pullman Co.*, 312 U.S. 496, 499-500), but, even if such a question could be raised by a single judge on this complaint, the doctrine has no application to the instant case, which involves a statute that the highest court of Massachusetts has already interpreted and held to be constitutional. *Klous* v. *Judge of the Municipal Court of Boston*, 251 Mass. 292, 294. *Commonwealth* v. *Rice*, 216 Mass. 480, 482.[4] In brief, all the procedural prerequisites for bringing 28 U.S.C. §§ 2281 and 2284, into play have been met.

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[4] Indeed, were it not for the holdings of *Klous* and *Rice*, one might question whether the statute really authorizes a District or Municipal Court judge to bind a defendant over to a grand jury after trial has commenced, but any other interpretations of this statute are foreclosed by the Supreme Judicial Court's constructions in these cases.

## III. The District Court Erred in Ruling that the Complaint Fails to Raise a Substantial Federal Question.

### *A. Mass. Gen. Laws, C. 218, § 30, Authorizes the Petitioner to be Placed in Double Jeopardy; the Respondent's Characterization of the Proceedings before the Charlestown Court as "but a Preliminary Stage of a Continuous Proceeding" was Erroneous and Irrelevant.*

The allegations of the complaint are clear. The petitioner was called to trial on the charges in the Municipal Court of the Charlestown District, and the court proceeded to swear witnesses and hear evidence against him. After hearing four witnesses, the Charlestown court, though it had jurisdiction to try the case fully, declined to hear it further, and bound the petitioner over for indictment by a grand jury (A. 18). Petitioner's counsel objected (A. 18). The petitioner has been indicted (A. 19).

In original criminal cases, District and Municipal Courts in Massachusetts sit without juries. See *Commonwealth* v. *Leach,* 246 Mass. 464, 465-466. Jeopardy in this case attached, therefore, when the first witness against the petitioner was called in the Charlestown court. *McCarthy* v. *Zerbst,* 85 F. 2d 640, 642, cert. den. 299 U.S. 610 (C.A. 10). *United States* v. *Tateo,* 377 U.S. 463, 474, fn. 4 (dissenting opinion). Therefore the judge, except perhaps to prevent an injustice to a defendant (see *United States* v. *Tateo,* 377 U.S. 463, 468),[5] could not summarily end the trial without the attachment of jeopardy. *Downum* v. *United States,* 372 U.S. 734, 737-738.

The respondent characterized the petitioner's trial in the Charlestown court as "but a preliminary stage of a continuous proceeding." It is difficult to determine what

[5] The *Tateo* doctrine could not have any applicability to the present case, where the complaint shows that the trial was ended over petitioner's objection. *Cf. Tateo, supra,* 468.

he meant by this. Trial in the Superior Court on an indictment is *de novo* in Massachusetts. See *Commonwealth* v. *O'Leary,* 347 Mass. 387, 389; *Arsenault* v. *Commonwealth,* 1968 Mass. Adv. Sh. 173, 179-180, reversed 89 S. Ct. 35. This would be true even if the petitioner had waived, as the respondent noted he had a right to waive (A. 21), indictment under Mass. Gen. Laws, c. 263, § 4A. *De Golyer* v. *Commonwealth,* 314 Mass. 626, 632. On the other hand, an indictment may be prosecuted in the Superior Court notwithstanding dismissal of a complaint at the level of the district or municipal court level. *Commonwealth* v. *Ballou,* 350 Mass. 751, 752, cert. den. 385 U.S. 1031. Customarily, indictments in the Superior Court receive a new number and contain no reference to any lower court proceedings. In short, the proceeding in the Superior Court on indictment is independent and distinct from anything that takes place in a municipal court.

In any event, whether an ontologist would regard the proceedings in the Charlestown court and the indictment now pending in the Superior Court as singular or plural is totally immaterial to the point raised in the complaint. The gravamen of petitioner's argument is that the Charlestown court had jurisdiction to try him, proceeded to try him, and terminated the trial without a verdict; that he has now been indicted for the same offenses as those for which he was tried in Charlestown; and that the Massachusetts statute is unconstitutional in setting up the procedure for placing petitioner in double jeopardy. In the *Downum* case, *supra,* the respondent might with much greater accuracy have argued that the second trial of the petitioner was part of a "continuous proceeding." This fact in itself did not, of course, prevent the attachment of jeopardy in that case. Indeed, the present case is *a fortiori* to *Downum,* since at least there, as the dissent points out

(740-743), some reason existed for the declaring of a mistrial after the jury was selected.

### *B. The Prosecution of the Pending Indictment against the Petitioners under Mass. Gen. Laws, C. 218, § 30, is Violative of Petitioner's Rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.*

Judge Julian, in his memorandum and order, did not consider the question of whether the so-called "double jeopardy" provision of the Fifth Amendment is binding upon the states via the Due Process Clause of the Fourteenth Amendment. The petitioner concedes that the last time this Court addressed itself to this issue, in 1953, in *Brock* v. *North Carolina,* 344 U.S. 424, 426-427, it held that the clause was not binding upon the states.

But *Brock* is hardly dispositive of the case at bar. Since 1958 this Court of the United States, overruling numerous prior decisions, has held that various provisions of the Bill of Rights are binding upon the states via the Fourteenth Amendment. *Cf., e.g., Wolf* v. *Colorado,* 338 U.S. 25, with *Mapp* v. *Ohio,* 367 U.S. 643 (search and seizure); *Betts* v. *Brady,* 316 U.S. 455, with *Gideon* v. *Wainwright,* 372 U.S. 335 (right to counsel); *Adamson* v. *California,* 332 U.S. 46, with *Malloy* v. *Hogan,* 378 U.S. 1 (self-incrimination). Indeed, in the 1967 term the Court, overruling almost a century of precedent, held that the Sixth Amendment right to trial by jury is so "fundamental to the American scheme of justice" that it is necessarily incorporated into the Fourteenth Amendment. *Duncan* v. *Louisiana,* 391 U.S. 145, 149.

Petitioner submits that the Fifth Amendment prohibition against double jeopardy is a fundamental constitu-

tional guaranty, and that it should apply to the states as well as to the federal government. That very question is now under consideration by this Court. *Benton* v. *Maryland,* 392 U.S. 415. But, in advancing this argument, petitioner recognizes that it is beyond the scope of this petition. The issue here is not whether Mass. Gen. Laws, c. 218, § 30, is patently unconstitutional—indeed, if it were, a three-judge court arguably would not be needed to enjoin its enforcement (*Booker* v. *State of Tennessee Board of Education,* 240 F. 2d 689, 691, cert. den. 353 U.S. 965 (C.A. 6))—but only whether a "substantial" federal question as to its constitutionality is raised. Petitioner submits that the federal question raised by this complaint was indeed substantial, and that Judge Julian erred in holding otherwise.

## IV. The Respondent Erred in Ruling that the Complaint Failed to Allege "Irreparable Harm" or Other Circumstances Requiring Injunctive Relief.

The petitioner agrees with Judge Julian (A. 21) that a showing of irreparable harm and special circumstances is a prerequisite to the enjoining state criminal prosecution. *Cameron* v. *Johnson,* 390 U.S. 611, 618, and cases cited. But to state that is to state no more than a legal conclusion, whose precise dimensions can only be known when they are viewed in the perspective of legal precedent and social value. Obviously, for example, in a society that placed little value upon human life it would not be irreparable damage that a life would be extinguished unless an injunction were issued; in a society that did not value private property it would be immaterial that, without an injunction, a given piece of such property would be dissipated. We assume that the most important source of

meaning for the term "irreparable damage" in an American court is the Constitution itself, to the extent that the Constitution may illuminate the subject.

It may be of use to quote the relevant language in the Fifth Amendment:

> ". . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . ."

Note the precise language of the Constitution relative to double jeopardy. It does not say or purport to say that for the same offense no person shall be subject to be twice punished; rather, it says that a person shall not "be subject for the same offence to be twice put in jeopardy." The distinction between punishment and jeopardy of punishment has been observed by the courts from the early days of the Republic. *United States* v. *Coolidge*, 25 Fed. Cas. 622, 623 (Story, J.). *United States* v. *Ball*, 163 U.S. 662, 669. *Green* v. *United States*, 355 U.S. 184, 187. *Downum* v. *United States*, *supra*, 736. As was said in *Ex parte Lange*, 18 Wall. 163, 169: "The constitutional prohibition against 'double jeopardy' was designed to protect the individual from being subjected to trial and possible conviction more than once for an alleged offense."

If the Fifth Amendment were merely a guaranty against double punishment, conceivably the respondent judge would be correct in holding that the complaint failed to allege irreparable damage. One could then say that, as long as the courts of Massachusetts afforded the petitioner a means of raising the issue, he could appeal any punishment that the courts might impose through the state courts and then to this Court, if necessary. The review afforded by such appeal would have to be considered an

"adequate" remedy. *Dombrowski* v. *Pfister*, 380 U.S. 479, 485.

But the Constitution prohibits not merely double punishment but also double jeopardy. Petitioner, in violation of his constitutional rights but pursuant to a state statute, is now in double jeopardy. It is no vindication of petitioner's rights that, if he is convicted and punished a second time, he can appeal. If that were the petitioner's only remedy against the unconstitutional action described in the complaint, then, as far as the petitioner's precise constitutional right is concerned, he would be without any remedy at all. But a remedy in equity, to preserve a constitutional right, where the remedy at law is inadequate, has been too often recognized to admit of any doubt as to its existence. *Board of Liquidation* v. *McComb*, 92 U.S. 531, 541, and cases cited. *Cleveland* v. *Cleveland City Railroad Company*, 194 U.S. 517, 531. *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 126-127, and cases cited in fn. 14, p. 99. *Dombrowski* v. *Pfister, supra*, 485-489.

Indeed, the principle that the right not to be put in double jeopardy may require vindication through extraordinary means was recognized by this Court when it granted habeas corpus in *Ex parte Lange, supra*, 166, to release a prisoner whose rights under the clause had been violated. Habeas corpus, of course, would have been unavailable if the petitioner's remedy by appeal or writ of error had been deemed adequate. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 274, and cases cited. The principle has also been recognized by numerous state courts, although not those of Massachusetts (see *Cronin* v. *Judges of the Superior Court*, 253 Mass. 182, 184), which hold that the extraordinary writ of prohibition is available to enjoin proceedings in violation of the petitioner's right not to be put twice in jeopardy. *Rodriguez* v. *Superior Court*, 27

Cal. 2d 500, 501. *State ex rel. Zirk* v. *Muntzing*, 146 W. Va. 878, 892-900, and cases cited. *Matter of Kraemer* v. *County Court*, 6 N.Y. 2d 363, 365. *State ex rel. Wheeler* v. *Cooper*, 157 So. 2d 875, 877 (Fla. App.). Although, of course, habeas corpus and prohibition are common-law writs, their extraordinary nature is hardly different from that of an injunction, and we must assume that in an otherwise appropriate case injunction will also be available to protect this cherished right.

## Conclusion.

A writ of certiorari should issue to review and reverse the judgment of the Court of Appeals for the First Circuit dismissing the petition for writ of mandamus, and/or a writ of mandamus should issue to order the judge of the United States District Court for the District of Massachusetts to refer petitioner's complaint to a three-judge court.

Respectfully submitted,

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## Appendix A.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 68-540-J.

ARTHUR F. BURHOE, *Plaintiff*
*vs.*
GARRETT BYRNE, as he is District Attorney for the Suffolk District of the Commonwealth of Massachusetts, *Defendant*

MEMORANDUM AND ORDER

September 6, 1968

JULIAN, D. J.

This is a civil action in which plaintiff requests that a three-judge district court be empanelled. 28 U.S.C. §§ 2281, 2284. Plaintiff seeks both an interlocutory and a permanent injunction restraining defendant from prosecuting plaintiff under a criminal indictment now pending in Suffolk County Superior Court. The gist of the complaint is the contention that such a prosecution would constitute double jeopardy and that, accordingly, the State statute which authorizes such a prosecution, M.G.L. c. 218, § 30, is unconstitutional under the Fifth and Fourteenth amendments to the Constitution of the United States.

The present complaint is substantially identical to that previously filed in an earlier case before a different judge of this Court,[1] with one difference to be discussed below.

[1] *Burhoe* v. *Byrne*, C.A. No. 68-326-C, reported at 285 F. Supp. 382.

In both cases plaintiff alleged that on March 15, 1968, the Clerk of the Municipal Court of the Charlestown District of Boston issued two criminal complaints charging plaintiff with having received, respectively, 205 cases of assorted liquors and a truck, knowing the same to have been stolen; that the facts alleged in the complaints were sufficient under Massachusetts law to charge crimes (M.G.L. c. 266, § 60); that on or about March 20, 1968, plaintiff was arrested and charged with the crimes stated in the complaints; that he retained counsel; that he was arraigned in Municipal Court, where he pleaded not guilty; and that he was released on bail.

Plaintiff further alleges here, as he did in the earlier case in this Court, that after one continuance trial in Municipal Court was scheduled for April 9, 1968, on which date plaintiff appeared with counsel ready for trial; that the complaints were called for trial on that date; that plaintiff through counsel presented a motion to suppress evidence which the court heard and denied; that the court proceeded to swear witnesses and to hear evidence against plaintiff; and that, after four witnesses had testified, the Municipal Court judge declared over objection that he would hear no further evidence but would instead bind plaintiff over to the Superior Court, meaning and intending to mean that he found probable cause for the plaintiff to be indicted by a grand jury and that plaintiff could be so indicted. Plaintiff also alleged in both cases in this Court that the Municipal Court had jurisdiction to try the complaints and that the evidence presented was sufficient to show that the crimes charged were committed within the Municipal Court's territorial jurisdiction.

In the earlier edition of this case in this Court plaintiff alleged, on the basis of "information and belief," that defendant intended to seek an indictment against him for

the same offenses from a Suffolk County grand jury. The single judge dismissed the complaint in that earlier case for failure to raise issues which were appropriate for consideration by a three-judge court, since

> "the allegations . . . taken as true . . . sounding the alarm, as they do, against the still 'iffy' possibility of an indictment of plaintiff by a Massachusetts grand jury, which possibility is alleged herein only as a matter of information and belief, do not present, at least at this time, a substantial federal question."

*Burhoe* v. *Byrne*, 1968, D. Mass., 285 F. Supp. 382, at 384-385.

Plaintiff has now returned with the instant complaint, alleging additionally that on May 6, 1968, he was in fact indicted by a Suffolk County grand jury of the same offenses charged in the Municipal Court complaints, and that defendant is now prosecuting plaintiff on that indictment.

Plaintiff alleges here that, if the pending prosecution is not enjoined, he will suffer irreparable damage in that he will be put to great expense, time, and inconvenience to defend himself and in that he will be exposed to shame, "obloguy" [sic] and degradation. He also alleges that, whereas the maximum sentence which the Municipal Court could have imposed on each complaint was two years in a house of correction, the Superior Court can sentence him to a term of five years in a prison.

As the Supreme Court noted in *Idlewild Liquor Corporation* v. *Epstein*, 1962, 370 U.S. 713, at 715, when

> "an application for a statutory three-judge court is addressed to a district court, the [single judge's] inquiry is appropriately limited to determining whether the constitutional question raised is substantial,

> whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute."

In dismissing the earlier case the single judge ruled that that complaint raised no substantial federal question because plaintiff had not yet been indicted in the Superior Court. Assuming, without deciding, the truth of the present allegation that plaintiff has now been indicted,[2] the reason cited in the earlier case is now moot.

Nonetheless, the present complaint still does not raise a substantial federal question. The State procedure under which the Municipal Court "bound over" the plaintiff for indictment and trial in the Superior Court grants to the Municipal Court

> "a discretionary power either to hear and determine the complaint brought before [it], exercising in that event a final jurisdiction (except as a defendant, if convicted, may choose to appeal to a higher court), or to bind the defendant over for trial in the Superior Court. . . . Ordinarily the discretion cannot be exercised wisely until at least the incriminating evidence has been heard."

*Commonwealth* v. *Rice,* 1914, 216 Mass. 480, 481-482. By choosing the latter alternative and binding the plaintiff over to the Superior Court, the Municipal Court declined to assume final jurisdiction of the case. The proceedings in the Municipal Court, accordingly, were but a preliminary

[2] The pleadings here reveal that the indictment was returned on May 6, 1968. Yet it is clear from the opinion in the earlier case that the judge there was not advised of that fact prior to the issuance of his opinion on June 6, 1968. Why he was not so informed does not appear.

stage of a continuous proceeding, now transferred to and pending in the Superior Court.

Once he had been bound over to the Superior Court, plaintiff had the option of either waiving indictment or not. Had he waived indictment as permitted by M.G.L. c. 263, § 4A (which refers specifically to cases bound over under M.G.L. c. 218, § 30), the District Attorney with court approval might have proceeded against him on the complaint. Since plaintiff did not waive indictment, however, M.G.L. c. 263, § 4 required that he be indicted before the case proceeded further in Superior Court. This did not, however, alter the inchoate nature of the proceedings in Municipal Court.

I rule that plaintiff's claim of double jeopardy is frivolous and raises no substantial federal question. There is therefore no occasion to convene a three-judge district court, and the complaint should be dismissed. 28 U.S.C. § 2281.

The single judge before whom plaintiff's earlier case was heard also based the dismissal there on the alternative ground that there was "no allegation or showing of either irreparable harm or special circumstances . . . of a nature to justify the extraordinary remedy of an injunction . . ." *Burhoe* v. *Byrne, supra,* 285 F. Supp. at 385.

I find nothing in the present complaint to merit a different conclusion. As the Supreme Court observed in *Cameron* v. *Johnson,* 1968, 390 U.S. 611, at 618:

> "[A] showing of 'special circumstances' beyond the injury incidental to every proceeding brought lawfully and in good faith is requisite to a finding of irreparable injury sufficient to justify the extraordinary remedy of an injunction."

*Accord, Dombrowski* v. *Pfister,* 1965, 380 U.S. 479, 484-485; *Douglas* v. *City of Jeannette,* 1943, 319 U.S. 157, 164. No such "special circumstances" are alleged in this case. The complaint thus raises no issues appropriate for the convening of a three-judge court. Accordingly, the complaint should be, and it is hereby ORDERED, dismissed.

United States District Judge

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**Appendix B.**

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 7220.

IN RE ARTHUR F. BURHOE,
*Petitioner.*

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ORDER OF COURT

November 4, 1968

It is ordered that the petition for writ of mandamus be, and the same hereby is, denied for want of jurisdiction.

By the Court:

ROGER A. STINCHFIELD
Clerk.

Enter: ALDRICH, Ch. J.

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## Appendix C.

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### Amendments to Constitution of the United States.

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and

Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§ 1331. Federal question; amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. [June 25, 1948, ch. 646, 62 Stat. 930; July 25, 1958, Pub. L. 85–554, § 1, 72 Stat. 415.]

* * *

§ 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. [June 25, 1948, ch. 646, 62 Stat. 944; May 24, 1949, ch. 139, § 90, 63 Stat. 102.]

* * *

§ 2281. Injunction against enforcement of State statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State stat-

ute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. [June 25, 1948, ch. 646, 62 Stat. 968.]

* * *

§ 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good

faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. [June 25, 1948, ch. 646, 62 Stat. 968; June 11, 1960, Pub. L. 86–507, § 1(19), 74 Stat. 201.]

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**Massachusetts General Laws, Chapter 218.**

DISTRICT COURTS.

TERRITORIAL JURISDICTION AND POWERS.

SECTION 1. The judicial districts of the several district courts shall continue to comprise the following cities, towns, wards and territory, in the following counties, respectively:

*Barnstable.*

The first district court of Barnstable, held at Barnstable and Falmouth; Barnstable, Bourne, Yarmouth, Sandwich, Falmouth and Mashpee.

The second district court of Barnstable, held at Harwich and Provincetown; Provincetown, Truro, Wellfleet, Eastham, Orleans, Brewster, Chatham, Harwich and Dennis.

*Berkshire.*

The district court of central Berkshire, held at Pittsfield; Pittsfield, Hancock, Lanesborough, Peru, Hinsdale, Dalton, Washington, Richmond, Lenox, Becket and Windsor; the district court of Lee exercising concurrent jurisdiction in Lenox and Becket and the fourth district court of Berkshire exercising concurrent jurisdiction in Windsor.

The district court of northern Berkshire, held at North Adams; North Adams, Clarksburg and Florida.

The district court of southern Berkshire, held at Great Barrington; Sheffield, Great Barrington, Egremont, Alford,

Mount Washington, Monterey, New Marlborough, West Stockbridge and Sandisfield; the district court of Lee exercising concurrent jurisdiction in Sandisfield.

The fourth district court of Berkshire, held at Adams; Adams, Cheshire, Savoy and Windsor; the district court of central Berkshire exercising concurrent jurisdiction in Windsor.

The district court of Lee, held at Lee; Lee, Stockbridge, Tyringham, Otis, Sandisfield, Lenox and Becket; the district court of southern Berkshire exercising concurrent jurisdiction in Sandisfield and the district court of central Berkshire exercising concurrent jurisdiction in Lenox and Becket.

The district court of Williamstown, held at Williamstown; Williamstown and New Ashford.

*Bristol.*

The first district court of Bristol, held at Taunton; Taunton, Rehoboth, Berkley, Dighton, Seekonk, Easton and Raynham.

The second district court of Bristol, held at Fall River; Fall River, Somerset, Swansea, Freetown and Westport; the third district court of Bristol exercising concurrent jurisdiction in Freetown and Westport.

The third district court of Bristol, held at New Bedford; New Bedford, Fairhaven, Acushnet, Dartmouth, Freetown and Westport; the second district court of Bristol exercising concurrent jurisdiction in Freetown and Westport.

The fourth district court of Bristol, held at Attleboro; Attleboro, North Attleborough, Mansfield and Norton.

*Dukes County.*

The district court of Dukes County, held at Oak Bluffs, Edgartown and Tisbury; Dukes County.

*Essex.*

The first district court of Essex, held at Salem; Salem, Beverly, Danvers, Hamilton, Middleton, Topsfield, Wenham and Manchester.

The second district court of Essex, held at Amesbury; Amesbury, Merrimac and Salisbury; the district court of Newburyport exercising concurrent jurisdiction in Salisbury.

The third district court of Essex, held at Ipswich; Ipswich.

The central district court of northern Essex, held at Haverhill; Haverhill, Groveland, Georgetown, Boxford and West Newbury; the district court of Newburyport exercising concurrent jurisdiction in West Newbury.

The district court of eastern Essex, held at Gloucester; Gloucester, Rockport and Essex.

The district court of southern Essex, held at Lynn; Lynn, Swampscott, Saugus, Marblehead and Nahant.

The district court of Lawrence, held at Lawrence and Methuen; Lawrence, Andover, North Andover, and Methuen.

The district court of Newburyport, held at Newburyport; Newburyport, Newbury, Rowley, Salisbury and West Newbury; the second district court of Essex exercising concurrent jurisdiction in Salisbury and the central district court of northern Essex exercising concurrent jurisdiction in West Newbury.

The district court of Peabody, held at Peabody; Peabody and Lynnfield.

*Franklin.*

The district court of Franklin, held at Greenfield, and at Turners Falls in Montague; Franklin county, except Orange, Erving, Warwick, Wendell and New Salem. Ses-

sions may also be held at Shelburne Falls in Shelburne and Buckland at such times and places as the justice of said court may determine.

The district court of eastern Franklin, held at Orange; Orange, Erving, Warwick, Wendell and New Salem.

*Hampden.*

The district court of eastern Hampden, held at Palmer; Palmer, Brimfield, Hampden, Monson, Holland, Wales and Wilbraham.

The district court of western Hampden, held at Westfield and Chester; Westfield, Chester, Granville, Southwick, Russell, Blandford, Tolland and Montgomery.

The district court of Chicopee, held at Chicopee; Chicopee.

The district court of Holyoke, held at Holyoke; Holyoke.

The district court of Springfield, held at Springfield; Springfield, West Springfield, Agawam, Longmeadow, East Longmeadow and Ludlow.

*Hampshire.*

The district court of Hampshire, held at Northampton, Amherst, Cummington, Belchertown, South Hadley, Huntington and Easthampton; Hampshire county, except Ware.

The district court of eastern Hampshire, held at Ware; Ware.

*Middlesex.*

The district court of central Middlesex, held at Concord; Concord, Acton, Bedford, Carlisle, Lincoln, Maynard, Stow and Lexington.

The first district court of northern Middlesex, held at Ayer; Ayer, Dunstable, Groton, Pepperell, Townsend, Ashby, Shirley, Westford, Littleton and Boxborough.

The first district court of eastern Middlesex, held at Malden; Malden, Wakefield, Melrose, Everett and Medford.

The second district court of eastern Middlesex, held at Waltham; Waltham, Watertown and Weston.

The third district court of eastern Middlesex, held at Cambridge; Cambridge, Arlington and Belmont.

The fourth district court of eastern Middlesex, held at Woburn; Woburn, Winchester, Burlington, Wilmington, Stoneham, Reading and North Reading.

The first district court of southern Middlesex, held at Framingham; Framingham, Ashland, Holliston, Sherborn, Sudbury, Wayland and Hopkinton.

The district court of Lowell, held at Lowell; Lowell, Tewksbury, Billerica, Dracut, Chelmsford and Tyngsborough.

The district court of Marlborough, held at Marlborough; Marlborough and Hudson.

The district court of Natick, held at Natick; Natick.

The district court of Newton, held at Newton; Newton.

The district court of Somerville, held at Somerville; Somerville.

*Nantucket.*

The district court of Nantucket, held at Nantucket; Nantucket county.

*Norfolk.*

The district court of northern Norfolk, held at Dedham; Dedham, Dover, Norwood, Westwood, Medfield, Needham and Wellesley.

The district court of East Norfolk, held at Quincy; Quincy, Randolph, Braintree, Cohasset, Weymouth, Holbrook and Milton; and, in criminal cases, concurrently with the second district court of Plymouth, that part of Scituate

described in chapter three hundred and ninety-four of the acts of nineteen hundred and twelve. Arrests and service of process in such cases may be made by an officer qualified to serve criminal process in Cohasset. This provision shall not increase the judicial district of said court for the purposes of section seventy-eight.

The district court of southern Norfolk, held at Stoughton; Stoughton, Avon, Canton and Sharon.

The district court of western Norfolk, held at Wrentham; Franklin, Walpole, Bellingham, Foxborough, Medway, Millis, Norfolk, Wrentham and Plainville.

The municipal court of Brookline, held at Brookline; Brookline.

*Plymouth.*

The second district court of Plymouth, held at Hingham; Abington, Hingham, Whitman, Rockland, Hull, Hanover, Scituate, Norwell and Hanson.

The third district court of Plymouth, held at Plymouth; Plymouth, Kingston, Plympton, Pembroke, Duxbury and Marshfield.

The fourth district court of Plymouth, held at Middleborough and Wareham; Middleborough, Wareham, Lakeville, Marion, Mattapoisett, Rochester and Carver.

The district court of Brockton, held at Brockton; Brockton, Bridgewater, East Bridgewater, Halifax and West Bridgewater.

*Suffolk.*

The municipal court of the city of Boston, held at Boston; wards six, seven, eight, nine, ten, eleven, twelve, sixteen, seventeen and eighteen of Boston as they existed on February first, eighteen hundred and eighty-two; and in criminal cases, concurrently with the municipal courts of the Roxbury and Brighton districts, the second and third dis-

trict courts of eastern Middlesex, and the district court of Newton, respectively, so much of the Charles river basin, as defined in section two of chapter five hundred and twenty-four of the acts of nineteen hundred and nine, as affected by chapter two hundred and forty-five of the General Acts of nineteen hundred and sixteen, as is within the districts of said courts.

The municipal court of the Brighton district, held at Brighton in Boston; ward twenty-five of Boston as it existed on February first, eighteen hundred and eighty-two.

The municipal court of the Charlestown district, held at Charlestown in Boston; wards three, four and five of Boston as they existed on February first, eighteen hundred and eighty-two.

The district court of Chelsea, held at Chelsea; Chelsea and Revere.

The municipal court of the Dorchester district, held at Dorchester in Boston; ward twenty-four of Boston as it existed on February first, eighteen hundred and eighty-two, and the territory comprised within the limits of precinct twelve of ward thirteen of Boston as it existed on November second, nineteen hundred and forty-eight.

The East Boston district court, held at East Boston in Boston; Winthrop and wards one and two of Boston as they existed on March first, eighteen hundred and eighty-six.

The municipal court of the Roxbury district, held at Roxbury in Boston; wards nineteen, twenty, twenty-one and twenty-two of Boston as they existed on February first, eighteen hundred and eighty-two; excepting cases of juvenile offenders under seventeen and cases of neglected, wayward or delinquent children.

The municipal court of the South Boston district, held at South Boston in Boston; wards thirteen, fourteen and

fifteen of Boston as they existed on February first, eighteen hundred and eighty-two.

The municipal court of the West Roxbury district, held at West Roxbury in Boston; ward twenty-three of Boston as it existed on February first, eighteen hundred and eighty-two, and the territory comprised within the limits of the former town of Hyde Park which was annexed to Boston by chapters four hundred and sixty-nine and five hundred and eighty-three of the acts of nineteen hundred and eleven.

*Worcester.*

The central district court of Worcester, held at Worcester; Worcester, Millbury, Sutton, Auburn, Leicester, Paxton, West Boylston, Holden, Shrewsbury, Rutland, Barre, Princeton and Oakham.

The first district court of northern Worcester, held at Athol and Gardner; Athol, Gardner, Petersham, Phillipston, Royalston, Templeton, Hubbardston and Westminster.

The first district court of eastern Worcester, held at Westborough and Grafton; Westborough, Grafton, Southborough and Northborough.

The second district court of eastern Worcester, held at Clinton; Clinton, Berlin, Bolton, Boylston, Harvard, Lancaster and Sterling.

The first district court of southern Worcester, held at Southbridge and Webster; Southbridge, Webster, Sturbridge, Charlton, Dudley and Oxford.

The second district court of southern Worcester, held at Blackstone and Uxbridge, and at Northbridge in that part thereof called Whitinsville; Blackstone, Uxbridge, Douglas, Northbridge and Millville.

The third district court of southern Worcester, held at Milford; Milford, Mendon, Upton and Hopedale.

The district court of western Worcester, held at East Brookfield; East Brookfield, Brookfield, Spencer, North Brookfield, West Brookfield, Warren, Hardwick and New Braintree. Said court may adjourn to any town within its district other than East Brookfield whenever the public convenience seems to the presiding justice to render such adjournment expedient.

The district court of Fitchburg, held at Fitchburg; Fitchburg, Ashburnham and Lunenburg.

The district court of Leominster, held at Leominster; Leominster.

The district court of Winchendon, held at Winchendon; Winchendon.

[As amended through St. 1965, c. 659, § 4.]

* * *

SECTION 26. District courts shall have original jurisdiction, concurrent with the superior court, of the following offences committed within their respective districts or otherwise made punishable therein: all violations of by-laws, orders, ordinances, rules and regulations, made by cities, towns and public officers, all misdemeanors, except libels, all felonies punishable by imprisonment in the state prison for not more than five years, the crimes mentioned in sections eighteen and nineteen of chapter two hundred and sixty-six, and the crimes of forgery of a promissory note, or of an order for money or other property, and of uttering as true such a forged note or order, knowing the same to be forged, if in either case the sum of money or the value of the property named in such note or order does not exceed one hundred dollars. They shall have jurisdiction of proceedings referred to them under the provisions of section four A of chapter two hundred and eleven.

[As amended through St. 1964, c. 140.]

* * *

SECTION 30. They shall commit or bind over for trial in the superior court persons brought before them who appear to be guilty of crimes not within their final jurisdiction, and may so commit or bind over persons brought before them who appear to be guilty of crimes within their final jurisdiction. In such cases the clerk of the district court shall forthwith transmit to the clerk of the superior court a copy of the complaint and of the record, the original recognizances, a list of the witnesses, a statement of the expenses and the appearance of the attorney for the defendant, if any is entered, and the report of the department of mental health as to the mental condition of the defendant, if such report has been filed under the provisions of section one hundred A of chapter one hundred and twenty-three, and no other papers need be transmitted. If such a person is committed for failure to recognize as ordered, the superior court shall thereupon have jurisdiction of the case against such person for the purpose of revising the amount of bail theretofore fixed.

[As amended by St. 1941, c. 194, § 19.]

**Massachusetts General Laws, Chapter 266.**

SECTION 60. Whoever buys, receives or aids in the concealment of stolen or embezzled property, knowing it to have been stolen or embezzled, or whoever with intent to defraud buys, receives or aids in the concealment of property, knowing it to have been obtained from a person by a false pretence of carrying on business and dealing in the ordinary course of trade, shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years.

TITLE V. EXTRAORDINARY WRITS.

*Rule 21. Writs of mandamus and prohibition directed to a judge or judges and other extraordinary writs.*

(*a*) *Mandamus or prohibition to a judge or judges; petition for writ; service and filing.*—Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(*b*) *Denial; order directing answer.*—If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they may so advise the clerk and all parties by letter, but the petition

shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

(*c*) *Other extraordinary writs.*—Application for extraordinary writs other than those provided for in subdivisions (a) and (b) of this rule shall be made by petition filed with the clerk of the court of appeals with proof of service on the parties named as respondents. Proceedings on such application shall conform, so far as is practicable, to the procedure prescribed in subdivisions (a) and (b) of this rule.

(*d*) *Form of papers; number of copies.*—All papers may be typewritten. Three copies shall be filed with the original, but the court may direct that additional copies be furnished.

LIBRARY
SUPREME COURT, U. S.

FILED
MAR 31 1969
JOHN F. DAVIS, CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 996.

ARTHUR F. BURHOE,
*Petitioner,*
*v.*
HON. ANTHONY JULIAN, as he is Judge of the United States District Court for the District of Massachusetts, and GARRETT BYRNE, as he is District Attorney for the Suffolk District,
*Respondents.*

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## BRIEF OF RESPONDENT GARRETT BYRNE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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# Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 996.

ARTHUR F. BURHOE,
*Petitioner,*
*v.*
HON. ANTHONY JULIAN, as he is Judge of the United States District Court for the District of Massachusetts, and GARRETT BYRNE, as he is District Attorney for the Suffolk District,
*Respondents.*

## BRIEF OF RESPONDENT GARRETT BYRNE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

### Introduction.

Respondent accepts the statement of petitioner for the purposes of this Brief in Opposition to the Petition for Certiorari.* We do not respond to petitioner's argument that the Court of Appeals was in error for failing to take jurisdiction over the petition for writ of mandamus. It may be unclear whether or not the Court of Appeals had jurisdiction to review the decision of the District Court judge

*The Petition is designated herein as "P."

denying the application for a three-judge court pursuant to a petition for writ of mandamus. (See generally, Barron and Holtzoff, Federal Practice and Procedure [Wright ed.], § 52.) Nonetheless, it would seem an inappropriate occasion to resolve technical niceties where this case was disposed of on its merits by the District Court and those merits have been characterized as "frivolous."

Because the merits are frivolous, we also feel it is unnecessary to consider whether or not *Brock* v. *North Carolina,* 344 U.S. 424, should be overruled so that the "double jeopardy" provision of the Fifth Amendment would be binding upon the states via the Due Process Clause of the Fourteenth Amendment. We will therefore only briefly argue herein that there is no double jeopardy under a federal or state standard where a lower court merely determines probable cause and that, in any event, the complaint sets forth no "special circumstances" which would warrant a Federal Court in exercising its equity jurisdiction to enjoin the prosecution of a state criminal action.

## Argument.

### I. No Double Jeopardy Occurs where a Lower Court merely Determines Probable Cause.

Petitioner attacks the constitutionality of Mass. G.L. c. 218, § 30 (see Appendix), which provides in part that the District Courts ". . . shall commit or bind over for trial in the superior court persons brought before them who *appear* to be guilty of crimes not within their final jurisdiction, and may so commit or bind over persons brought before them who *appear* to be guilty of crimes within their final jurisdiction." (Emphasis added.) (As amended by St. 1941, c. 194, § 19.) The power and discretion of the District Court

to commit or bind over is limited in the more serious crimes, however, since the District Court judge may not impose a sentence to a state prison (Mass. G.L. (Ter. Ed.) c. 218, § 27) (see Appendix).[1] Indeed, if the District Court judge were allowed to sentence to a state prison, it would be in violation of Article 12 of the Declaration of Rights of the Massachusetts Constitution (see Appendix) granting to a person accused of committing an "infamous" or capital crime the right to be indicted by a grand jury. *Jones* v. *Robbins,* 8 Gray 329, 339-350. ("Infamous" is synonymous with a felony. *Jones* v. *Robbins, supra,* 349.) It is only after preliminary examination that a judge can determine the seriousness of the crime and determine the necessity for a grand jury. To adopt petitioner's argument obviously would require the annihilation of the District Court system in Massachusetts and indeed all tribunals with powers to make preliminary determinations based on some credible evidence. It is clearly not a principle of law, as petitioner categorically suggests, that in every criminal proceeding when the first witness is called against a

[1] The distinction in Massachusetts between a state prison and a jail is one obviously made to segregate the serious offender from the minor offender, and it is the same basis for distinguishing a felony from a misdemeanor (G.L. c. 274, § 1) (see Appendix). Conviction under G.L. c. 266, § 60, carries a penalty of imprisonment in the state prison or a fine of not more than $500 and imprisonment in jail for not more than two years. However, because of G.L. (Ter. Ed.) c. 218, § 27, a District Court judge could not sentence to a state prison. Thus, this provides the basis for petitioner's allegation in his complaint that if the petitioner is tried on the various indictments, he *could* receive the maximum sentence of five years in the Superior Court rather than the maximum two-year sentence that a District Court *could* have imposed (P. 5). Petitioner, however, appropriately makes no argument regarding this possibility, probably because no sentence has ever been imposed on him, and therefore, any argument regarding sentencing at this juncture does not present a justiciable issue.

defendant, jeopardy attaches (P. 10). On the contrary, no jeopardy attaches where (as in this case) preliminary determinations are of no binding effect or prejudice to a defendant. *Draper* v. *Rhay,* 242 F. Supp. 829, aff'd 358 F. 2d 304 (9th Cir. 1966); cert. den. 382 U.S. 996.

Petitioner in fact points to no case that directly questions the validity of this proposition, but rather relies on cases that are obviously not factually in point. Indeed, the only Supreme Court of the United States opinion touching on the subject would support the conclusion that no jeopardy attached. *Collins* v. *Loisel,* 262 U.S. 426, citing with approval *Commonwealth* v. *Rice,* 216 Mass. 480. Accordingly, petitioner has made no showing of a substantial federal question that would warrant this Court in exercising its discretion to grant the petition.

## II. The Complaint Sets Forth No Special Circumstances which would Warrant the Court to Exercise its Equity Jurisdiction.

The petitioner sets forth no special facts or circumstances that would have warranted the District Court interfering with the prosecution of the petitioner in the courts of the Commonwealth of Massachusetts. There must be ". . . a showing of 'special circumstances' beyond the injury incidental to every proceeding brought lawfully and in good faith . . . to justify the extraordinary remedy of injunction." *Cameron* v. *Johnson,* 390 U.S. 611, 618; *Dombrowski* v. *Pfister,* 380 U.S. 479, 484-485; *Douglas* v. *City of Jeannette,* 319 U.S. 157, 164. Like *Cameron,* this is not a case in which ". . . a federal court of equity by withdrawing the determination of guilt from the state courts could rightly afford petitioners any protection which they could not secure by prompt trial and appeal pursued to this Court." *Douglas*

v. *City of Jeannette,* 319 U.S. 157, 164. The failure to show special circumstances has now been determined by two District Court judges and may have been the basis for the Court of Appeals decision. Hopefully, petitioner's pursuits in futility will come to an end with the denial of this petition for certiorari.

Lastly, it may very well be that the requirement of special circumstances which would warrant the interference of a Federal Court with a state criminal prosecution rests on the doctrine of federal abstention. See *Railroad Commission of Texas* v. *Pullman Co.,* 312 U.S. 496, 499-500. In such event, it is probably accurate, as an abstract proposition and as petitioner argues, that the doctrine has no application where a statute is involved which the highest court of the state has already interpreted and held to be constitutional (P. 9). Nonetheless, *Klous* v. *Judges of the Municipal Court of the City of Boston,* 251 Mass. 292, 294, and *Commonwealth* v. *Rice,* 216 Mass. 480, 482, which held that the concurrent jurisdiction of the District Court and Superior Court of Massachusetts create no problems of double jeopardy, were decided in 1925 and 1914, respectively. Even if Mass. G.L. c. 218, § 30 were arguably unconstitutional it would not seem inappropriate after more than forty years to cause this petitioner to challenge the constitutionality of Mass. G.L. c. 218, § 30 initially in the Massachusetts state courts.

## Conclusion.

For the foregoing reasons it is respectfully urged that the petition for certiorari be denied.

Respectfully submitted,

HOWARD M. MILLER,
Assistant Attorney General.

## Appendix.

### Massachusetts General Laws (Ter. Ed.) Chapter 274.

SECTION 1. A crime punishable by death or imprisonment in the state prison is a felony. All other crimes are misdemeanors.

### Massachusetts General Laws (Ter. Ed.) Chapter 218.

SECTION 27. They may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to the state prison.

### Massachusetts General Laws, Chapter 218.

SECTION 30. They shall commit or bind over for trial in the superior court persons brought before them who appear to be guilty of crimes not within their final jurisdiction, and may so commit or bind over persons brought before them who appear to be guilty of crimes within their final jurisdiction. In such cases the clerk of the district court shall forthwith transmit to the clerk of the superior court a copy of the complaint and of the record, the original recognizances, a list of the witnesses, a statement of the expenses and the appearance of the attorney for the defendant, if any is entered, and the report of the department of mental health as to the mental condition of the defendant, if such report has been filed under the provisions of section one hundred A of chapter one hundred and twenty-three, and no other papers need be transmitted. If such a person is committed for failure to recognize as ordered, the su-

perior court shall thereupon have jurisdiction of the case against such person for the purpose of revising the amount of bail theretofore fixed. (As amended by St. 1941, c. 194, § 19.)

**Massachusetts Constitution, Declaration of Rights, Article XII.**

XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No. 996 AND No. 1504 MISC.

ARTHUR F. BURHOE, PETITIONER

*v.*

HON. ANTHONY JULIAN AND GARRETT BYRNE

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS*

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## BRIEF FOR THE RESPONDENT JULIAN IN OPPOSITION [1]

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### OPINIONS BELOW

The order of the court of appeals denying the petition for a writ of mandamus (App. 22)[2] is unreported. The memorandum and order of the district court (App. 17–22) is reported at 289 F. Supp. 408.

### JURISDICTION

No. 996 (petition for a writ of certiorari)—The order of the court of appeals was entered on November 4, 1968 (App. 22). The petition for a writ of certio-

[1] Judge Julian requested the Department of Justice to appear in this action.

[2] "App." refers to the appendix pages of the combined petition for a writ of certiorari and motion for leave to file a petition for a writ of mandamus.



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rari was filed on January 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

No. 1504 Misc. (Motion for leave to file a petition for a writ of mandamus)—The motion for leave to file a petition for a writ of mandamus was filed on January 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1651.

## QUESTION PRESENTED

A single judge district court dismissed petitioner's action to enjoin a state prosecution, determining that the federal constitutional issue raised was plainly unsubstantial. The question presented is whether, after expiration of the time within which to appeal, mandamus will lie to review such a dismissal.

## STATEMENT

Petitioner commenced this action in the United States District Court for the District of Massachusetts to enjoin the District Attorney (a respondent in No. 996) from prosecuting him under a criminal indictment then pending in the Suffolk County Superior Court. The gravamen of the complaint was that, since petitioner was bound over to the Superior Court after proceedings had been begun against him in the Municipal Court, the prosecution in the Superior Court would subject him to double jeopardy. Petitioner acknowledged that the Superior Court prosecution was sanctioned by Massachusetts General Laws, c. 218, § 30, which, *inter alia,* authorizes the Municipal Court to "commit or bind over persons brought before them who appear to be guilty of crimes within their final jurisdiction." Petitioner asserted, however, that

the state statute as applied violated the Fifth and Fourteenth Amendments to the United States Constitution. He requested the convening of a three-judge court to consider the constitutional issue.

On September 6, 1968, the respondent single district judge dismissed the complaint, determining that petitioner's "claim of double jeopardy is frivolous and raises no substantial federal question" (App. 21). No appeal to the court of appeals was taken from that judgment within the 30-day period period prescribed by Rule 4(a) of the Federal Rules of Appellate Procedure. On October 24, 1968—18 days after the appeal period had expired—petitioner filed a petition for a writ of mandamus in the court of appeals, seeking to compel the district judge to refer the complaint to a three-judge court. On November 4, 1968, the court of appeals summarily denied the petition for want of jurisdiction (App. 22).

In this Court, petitioner seeks (1) review of the court of appeals' denial of his petition for mandamus, or (2) a writ of mandamus from this Court granting the relief that the court of appeals denied.

## ARGUMENT

The convening of a three-judge court under 28 U.S.C. 2284 is not required where the constitutional question sought to be raised is "plainly unsubstantial", either because it is "obviously without merit" or because it is foreclosed by previous decisions of this Court. *Ex parte Poresky,* 290 U.S. 30, 32; see *Bailey* v. *Patterson,* 369 U.S. 31, 33; *Bell* v. *Waterfront Commission,* 279 F. 2d 853, 857 (C.A. 2). More-

over, when, as here, a single district judge has entered a final order dismissing the complaint on the ground that the constitutional issue is unsubstantial, the proper avenue of review is an appeal to the court of appeals under 28 U.S.C. 1291. *E.g., Eastern States Petroleum Corporation* v. *Rogers,* 280 F. 2d 611, 613, n. 7, 615–616 (C.A.D.C.), certiorari denied, 364 U.S. 891.

Since petitioner had not prosecuted an appeal from the district court's dismissal of his complaint within the time specified by the Rules, the court of appeals properly denied his petition for mandamus there. Mandamus will lie only where there is not an adequate remedy by appeal. *Ex parte Fahey,* 332 U.S. 258, 260. Similarly, review of the district court's action is not available by seeking the issuance of a writ of mandamus in this Court. See *Ledford* v. *Curran,* 366 U.S. 948; *Lion Mfg. Corp.* v. *McGuire,* 373 U.S. 920.

## CONCLUSION

The petition for a writ of certiorari and the motion for leave to file a petition for a writ of mandamus should be denied.

Respectfully submitted.

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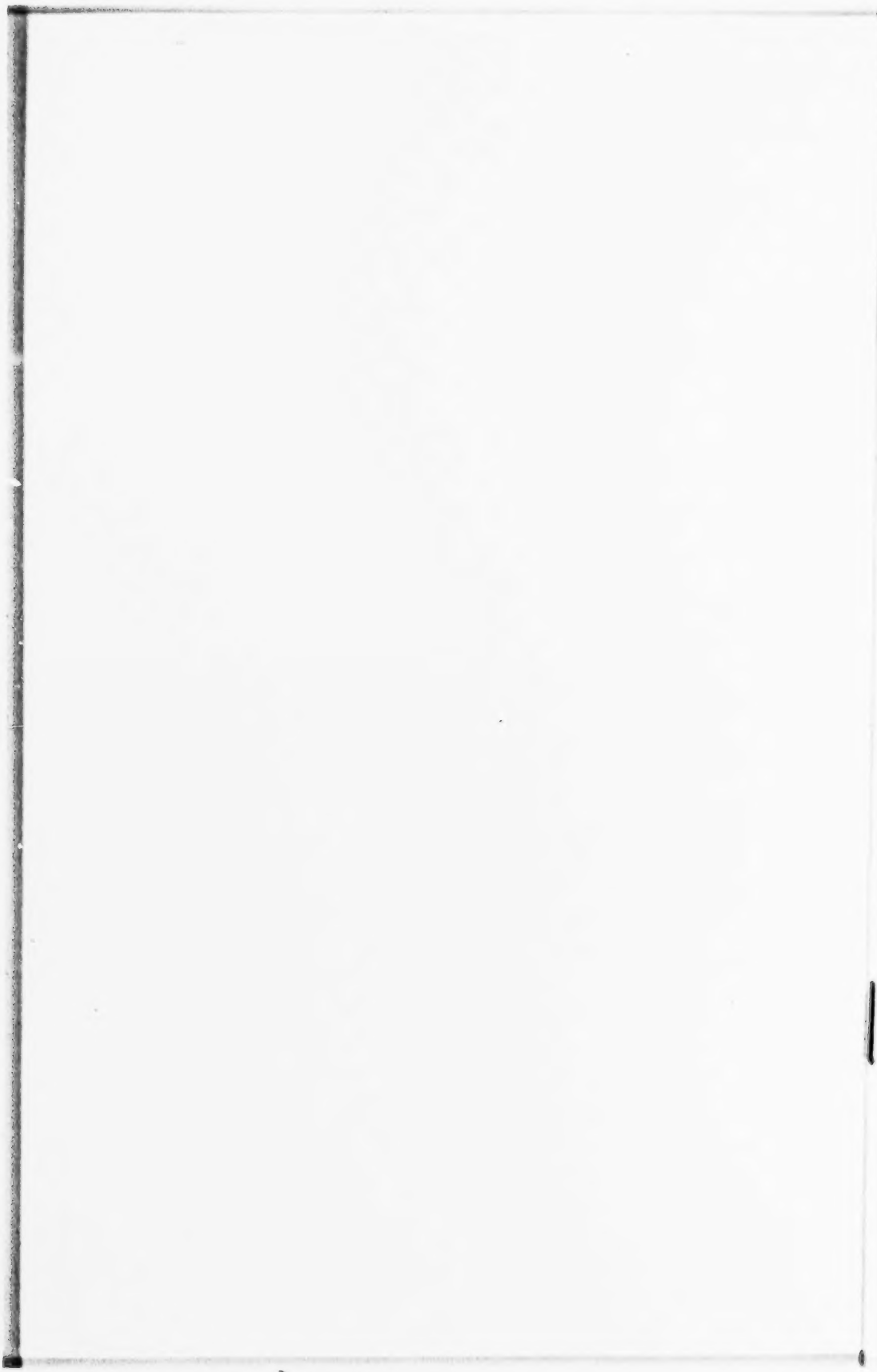

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# Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 996.

ARTHUR F. BURHOE,
*Petitioner,*
*v.*
HON. ANTHONY JULIAN, as he is Judge of the United States District Court for the District of Massachusetts, and GARRETT BYRNE, as he is District Attorney for the Suffolk District,
*Respondents.*

## PETITIONER'S REPLY BRIEF.

### Statement.

This brief is written in reply (Rule 24.4) to briefs in opposition to a petition for writ of certiorari and motion to file petition for writ of mandamus. The briefs in opposition have been filed by the Solicitor General of the United States on behalf of the respondent Judge Julian and by an Assistant Attorney General of Massachusetts on behalf of the respondent Garrett Byrne.

## Argument.

### I. There was Nothing "Preliminary" about the Proceedings in which Petitioner Alleges Jeopardy to have Attached.

In his brief the respondent Byrne argues (Brief, 2-4) at length that the proceedings in the Charlestown Municipal Court were only in the nature of a probable cause hearing and that, therefore, no jeopardy attached when they were dismissed after witnesses were sworn and heard. This argument is based upon a gross misstatement of the facts alleged in the petition and stated by Judge Julian. We quote from his opinion (Appendix, 18):

> "Plaintiff further alleges here . . . that after one continuance *trial in Municipal Court was scheduled for April 9, 1968,* on which date *plaintiff appeared with counsel ready for trial; that the complaints were called for trial on that date;* that plaintiff through counsel presented a motion to suppress evidence which the court heard and denied; *that the court proceeded to swear witnesses and to hear evidence against plaintiff;* and that, after four witnesses had testified, the Municipal Court judge declared over objection that he would hear no further evidence but would instead bind plaintiff over to the Superior Court, meaning and intending to mean that he found probable cause for the plaintiff to be indicted by a grand jury and that plaintiff could be so indicted. Plaintiff also alleged . . . that *the Municipal Court had jurisdiction to try the complaints* and that the evidence presented was sufficient to show that *the crimes charged were committed within the Municipal Court's territorial jurisdiction.*" (Emphasis supplied.)

## II. The Court of Appeals did Not Lose Jurisdiction to Issue a Writ of Mandamus because it Was Filed More than Thirty Days After the District Court Dismissed Petitioner's Complaint.

For the first time in this case, it is suggested in the brief of the Solicitor General that the petition for writ of mandamus in the Court of Appeals was dismissed because it was not timely (Brief, 4). The brief of the Solicitor General does not rule out mandamus in the Court of Appeals to compel the convening of a three-judge court but suggests that such a petition must be brought within the thirty-day appeal period prescribed by Rule 4(a) of the Federal Rules of Appellate Procedure (Brief, 2, 3, 4).[1]

It should be a sufficient answer to this argument that the doctrine of laches, not a statute of limitation, governs the bringing of federal mandamus proceedings. *Chapman* v. *County of Douglas*, 107 U.S. 348, 355. *United States ex. rel. Arant* v. *Lane*, 249 U.S. 367, 372. As this Court noted in *Holmberg* v. *Armbrecht*, 327 U.S. 392, 396, quoting *Gallihier* v. *Cadwell*, 145 U.S. 368, 373, "laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or rela-

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[1]The Solicitor General then seems to argue circularly that "[m]andamus will lie only where there is not an adequate remedy by appeal." Ergo, if plaintiff had brought mandamus proceedings within the thirty-day period, the Solicitor General would then argue that appeal was the appropriate remedy, whereas since there was no remedy by appeal when the mandamus proceeding was brought, the Solicitor General contends that there was no remedy by mandamus either. See pp. 7-8 of petition. It should also be noted that the thirty-day appeal period suggested in Rule 4(a) is not jurisdictional, since the rule clearly provides that "the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days. . . ."

tions of the property or the parties." It is hardly necessary to labor the point that the forty-eight day lapse between Judge Julian's dismissal and the filing of the petition in the Court of Appeals worked no inequity founded upon some change in conditions to any of the parties.

In *Ex parte Metropolitan Water Co. of West Virginia*, 220 U.S. 539, it would appear that this Court issued a writ of mandamus to compel the convening of a three-judge panel, though the petition was filed after the time for appeal (at that time, thirty days) had passed. In the case at bar, if petitioner had filed a notice of appeal thirty days after Judge Julian's judgment, the mechanics of the appeal (*e.g.*, printing) probably would have delayed its entry in the Court of Appeals to a later date than October 24, 1968, on which the petition for a writ of mandamus was filed.

The most significant argument, however, that can be made in response to the Solicitor General's contention is that the rule which he proposes is purposeless. If petitioner is correct in believing that his complaint should have been heard by a three-judge court, it is elementary that a single judge lacked jurisdiction to dismiss that complaint. *Stratton* v. *St. Louis Southwestern Railway Co.*, 282 U.S. 10, 15. The purpose of mandamus in the Court of Appeals, therefore, is to obtain guidance as to the District Court's jurisdiction. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 716. *Reed Enterprises* v. *Corcoran*, 354 F. 2d 519, 523-524. If such guidance becomes unavailable because more than thirty days have passed, the lack of jurisdiction to dismiss the complaint in the District Court is not cured and *res judicata* does not attach to such dismissal. *Williamson* v. *Berry*, 8 How. 495, 542. New proceedings could be commenced, and the parties could traverse several more miles of litigation merely to determine whether the

complaint should have been heard by a three-judge court.[2] This result should be avoided, and that question should now be answered.

Respectfully submitted,

DAVID BERMAN,

Attorney for the Petitioner.

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[2]Even if the Solicitor General were correct in arguing that the Court of Appeals lacked jurisdiction over the petition for writ of mandamus, it would not follow that "review of the district court's action is not available by seeking a writ of mandamus in this Court" (Brief, 4). If he were, it would mean that over half a century of precedent (see cases cited in *Stratton* v. *St. Louis Southwestern Railway Co.*, *supra*) was overruled *sub silentio* in *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, *supra*.